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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1319

JOSHUA POMERANTZ,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Jurisdictional Statement

The petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the petitioner was entitled to lie under oath to a New York grand jury about a conversation that he had in New Jersey on the ground that he had a concern, which he failed to express until his appeal from his conviction for perjury, that truthful testimony could be used as a basis for prosecution in New Jersey.

2. Whether the petitioner's perjury conviction should be nullified because, after uttering to the grand jury 54 of a total of 55 perjurious statements, the petitioner requested to see his attorney without giving any reason for the request, and then abandoned the request by consenting to a brief continuation of his testimony.

3. Whether the petitioner's right to due process was violated during the grand jury session at which he committed perjury by a prosecutor who warned him that he had evidence concerning petitioner's involvement in the criminal conduct under investigation and who then endeavored to get the truth from him with probing questions.

Statement of the Case

In January 1975, the State of New York authorized its Attorney General to conduct an intensive civil and criminal investigation into rampant corruption within the State's nursing home industry. *Sigety* v. *Hynes,* 38 N.Y.2d 260 (1975), *cert. denied sub nom. Kent Nursing Home* v. *Office of Special Prosecutor,* 425 U.S. 974 (1976). The investigation revealed that many supply firms were providing their nursing home customers with inflated or fictitious bills which the homes paid in full. Although the suppliers secretly returned to the operators of the nursing homes the full amount of these payments, the nursing homes involved were claiming and receiving Medicaid reimbursement from the State of New York based upon the full amount of the inflated or fictitious expenses.

Petitioner is a supplier of paper goods and cleaning chemicals to more than 30 nursing homes. His firm, the

Pomerantz Paper Company, is located in Brooklyn, New York. Twenty-two of his nursing home customers are located in New York State; eight are located in New Jersey. In July 1975, petitioner spoke to Ira Feinberg, the operator of a nursing home in New Jersey, concerning the kickbacks which petitioner pays to some of the institutions which he supplies. Petitioner described, in some detail, the typical methods by which he channeled kickback money to his nursing home clients. He also offered to pay kickbacks to Feinberg. This conversation took place at Feinberg's nursing home in New Jersey. Feinberg, in cooperation with the office of New York State's Special Prosecutor for Nursing Homes, wore a device which recorded petitioner's statements.

In May 1976, petitioner was called before a grand jury sitting in Brooklyn, New York, which was investigating frauds committed against New York's Medicaid reimbursement system by nursing home operators with the help of firms which supply nursing homes with goods and services. Petitioner was granted transactional immunity automatically by operation of New York State law for all matters about which he testified during his grand jury appearance. New York Criminal Procedure Law (CPL) §190.40 (McKinney 1971). (At the beginning of his testimony petitioner asked the prosecutor to grant him immunity. However, in view of CPL §190.40, this request was not necessary.) The prosecutor advised petitioner about this grant of immunity. He also described for petitioner the matters which the grand jury was investigating, and warned petitioner that he had evidence which indicated that petitioner might be giving kickbacks to his nursing home customers. The prosecutor repeatedly warned peti-

tioner, too, that he could be prosecuted for perjury if he lied in his testimony before the grand jury.

At the prosecutor's request, petitioner identified all of his nursing home customers in both New York and New Jersey. The prosecutor then asked him whether he had offered kickbacks to any nursing home operator. Petitioner denied that he had. Petitioner also denied having any personal knowledge about the use of kickbacks in the nursing home industry. He repeatedly denied that he had even spoken to any nursing home operator, including Ira Feinberg, about kickbacks.

Petitioner did not object to any question which the prosecutor asked him before the grand jury. Nor did he refuse to answer any question. In fact, the only complaints that petitioner made with respect to the grand jury proceeding were repeated references to the lateness of the hour. (The session ended at about 4 P.M.) Within minutes of his last such reference, petitioner asked to see his attorney:

> Q. Have you ever directly or indirectly sent or delivered or caused to be sent or delivered an inflated bill or delivery ticket to Fred Silverberg at the Hyde Park Nursing Home?
>
> A. No. Can I speak with my attorney please?
>
> Q. One last question, have you ever had any conversations whatsoever with Jack Rosen, Joseph Cohen, Andy Glattstein, Ira Feinberg, or Edward Karten in which you offered to give any of these individuals an inflated bill or cash rebate of any kind?
>
> A. I don't recall any such conversation.

The latter answer was the 55th and last statement alleged and found to be perjurious.

Although the prosecutor continued the questioning after petitioner had asked to see his attorney, petitioner neither complained nor repeated his request to see his attorney. Rather, he told the prosecutor that it was acceptable to him to continue the inquiry so long as it ended by 4 P.M. Shortly after petitioner asked to see his attorney, he left the grand jury room at the prosecutor's request and went into an anteroom where his attorney was waiting. When he was called back before the grand jury to complete his testimony, he did not object to any aspect of the grand jury proceedings. Instead, he answered eight additional questions concerning general business practices. None of his answers to these questions was assigned as perjurious in the indictment.

The petitioner lied a total of 55 times during his grand jury testimony. The prosecutor offered the petitioner an opportunity to recant. However, the petitioner declined to do so. An indictment, in which these false statements were segregated into three counts, was returned against the petitioner shortly after his grand jury testimony. Each of the three counts charged the crime of perjury in the first degree. New York Penal Law §210.15 (McKinney 1975). Petitioner was accused in this indictment of having testified falsely when he stated under oath before the grand jury (1) that he had no personal knowledge about the use of kickbacks in the nursing home industry (count one), (2) that he could not recall ever having spoken to Ira Feinberg or to any other nursing home operator about kickbacks (count two), and (3) that he had never offered a kickback to any nursing home operator, including Feinberg (count three).

The petitioner was tried before a jury which found him guilty on all three counts. He was sentenced to a maximum

three year term of imprisonment on October 19, 1977. Petitioner appealed his conviction to the Appellate Division of New York State Supreme Court, Second Department. That court reversed the conviction and dismissed the indictment, holding that the questioning of petitioner about his conversation with Feinberg was not relevant to the grand jury's investigation in New York because the conversation took place in New Jersey. Based upon this finding, the court stated that it believed the prosecutor had questioned petitioner about the conversation solely for the purpose of "trapping" him into a perjury charge. The Appellate Division further held that the prosecutor had acted improperly by failing to honor the petitioner's request to leave the grand jury room and speak to his attorney. The court surmised that the petitioner wanted to speak to his lawyer about whether the immunity he received in New York would protect him from prosecution in New Jersey. *People* v. *Pomerantz,* 63 A.D.2d 457 (2nd Dep't 1978).*

The New York Court of Appeals unanimously reversed the Appellate Division's decision and reinstated the indictment. The Court of Appeals held that the petitioner's conversation with Feinberg was "material to an authorized substantive investigation of the Grand Jury, namely, exposure of corruption in the New York nursing home industry." *People* v. *Pomerantz,* 46 N.Y.2d 240, 243 (1978). The court found that the prosecutor had treated the petitioner in a fair manner throughout the investigation. *Id.,* at 248.

* Petitioner did not contend at the trial level that either the grand jury or the prosecutor had deprived him of his right to confer with his attorney about either the scope of his immunity or any other legal matter. Nor did he argue that the prosecutor had called him before the grand jury in order to trap him into perjury. In fact, one of his trial lawyers specifically told the trial court that petitioner was not claiming that the grand jury was a "perjury trap."

It also stated that the prosecutor did not unfairly deprive him of an opportunity to consult with his attorney outside the grand jury chamber. *Id.,* at 250. The court observed that the petitioner had made 54 of the 55 statements assigned as perjurious in the indictment before asking to see his attorney.

After the New York Court of Appeals reinstated the indictment, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. He contended that the immunity he received when questioned before the New York grand jury was not sufficient to protect him from prosecution in New Jersey based upon his grand jury testimony.* He also argued that he was illegally deprived of a right to leave the grand jury room to consult with his attorney, and, further, that the prosecutor's aim in questioning him before the grand jury was to get him indicted for perjury. The court (Hon. Thomas C. Platt, J.) dismissed the petition on May 30, 1979. *Pomerantz* v. *New York,* 471 F.Supp. 338 (E.D.N.Y. 1979). The court rejected the "immunity" argument because it could not serve to excuse perjury. *Id.,* at 343. The court also held the "right to counsel" argument was meritless because the single perjurious statement made by the petitioner after he requested to see his lawyer was merely cumulative of some of the many false statements he made before the request. *Id.* The court said that the perjury trap claim was untenable because the prosecutor had warned the petitioner at the beginning of the grand jury session that he had evidence

* The State of New Jersey has not brought any charges against the petitioner in connection with his conversation with Ira Feinberg in that State or in connection with his grand jury testimony or his perjury prosecution in New York.

of his involvement in kickback deals, and then focused the petitioner's attention on this conversation with Feinberg with probing questions.

Thereafter, pursuant to 28 U.S.C. §2253, the petitioner applied for a certificate of probable cause to appeal from the District Court's order. The application was denied by the United States Court of Appeals for the Second Circuit on November 27, 1979, upon the ground that the issues which the petitioner raised in his application for a certificate of probable cause were without merit.*

ARGUMENT

None of the petitioner's claims merits review by this Court.

A. The Petitioner's Fifth Amendment Claim

The petitioner claims that had he testified truthfully before the New York grand jury, his testimony could have been used against him by New Jersey authorities in violation of his Fifth Amendment right against self-incrimination because, according to him, New York has no power to immunize a grand jury witness from prosecution in another state. Even if it were true that New York could not immunize a witness from prosecution in another state, the fact remains that the petitioner lied under oath before a grand jury. As the District Court recognized, this fact makes irrelevant his argument concerning the ability of

* The petitioner did not seek direct review by this Court of the order of the New York Court of Appeals which reinstated his indictment. The petitioner entitles his current petition as for a writ of certiorari to the Second Circuit. Consequently, were certiorari to be granted the only ruling which could be reviewed by this Court would be the denial of the certificate of probable cause.

New York to shield him from a prosecution in New Jersey. Indeed, this Court held in *United States* v. *Mandujano,* 425 U.S. 564 (1976), that, regardless of the nature of the abuse to which he feels himself subjected during his testimony, a witness may never resort to perjury as a method of self-protection. The Court explicitly stated that "[i]n this constitutional process of securing a witness' testimony, perjury simply has no place whatever." 425 U.S. at 576. The Court, at page 577, quoted with approval from its opinion in *Bryson* v. *United States,* 396 U.S. 64, 72 (1969):

> [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them.

See, United States v. *Apfelbaum,* No. 78-972, at 11-12, —— U.S. —— (March 3, 1980).

If during the grand jury session the petitioner truly was concerned that the testimony obtained from him under a grant of immunity in New York could have been used as a basis for a New Jersey prosecution, he should have refused to answer the questions put to him. Or, at the very least, he should have brought his objections to the attention of the grand jury or the court which supervised the grand jury. Petitioner failed to take any of these reasonable steps. Instead, he lied 55 times.

In any event, petitioner's grand jury testimony in New York could not have been used by New Jersey authorities as a basis for prosecution against him. This Court held in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), that

the testimony of a witness who gives evidence under an immunity grant in one jurisdiction may not be prosecuted by means of that evidence in another jurisdiction. The petitioner attempts to distinguish *Murphy* from his case on the ground that *Murphy* does not deal directly with "a state-to-state immunity question." The petitioner's argument is unavailing. The holding of *Murphy* involves the proper application of the Fifth Amendment's protection against self-incrimination. This protection, of course, applies uniformly to all jurisdictions in the United States, both state and federal.* Obviously, the legal and policy principles of the *Murphy* decision are applicable when two states are involved. Indeed, as one court recently stated:

> The *requirement that every sovereign, state or federal,* recognize immunity granted by another sovereign, *Murphy* v. *Waterfront Commission,* [*supra,*] protects appellant from the use of his grand jury testimony in any state prosecution (emphasis added).

In re Bianchi, 542 F.2d 98, 101 (1st Cir. 1976).

B. The Petitioner's Sixth Amendment Claim

Petitioner contends that the prosecutor violated his Sixth Amendment right to counsel by refusing to allow him to consult with his attorney outside the grand jury

* Petitioner cites *Zicarelli* v. *New Jersey Commission,* 406 U.S. 472 (1972), as authority for the proposition that his immunity in New York could not shield him from prosecution in New Jersey. Petition, at 7. *Zicarelli* is inapposite. There, the Court indicated that the protection of immunity afforded by a state of the United States could be inadequate to protect a person who, by his compelled testimony, might subject himself to prosecution in a foreign country where the Fifth Amendment is not recognized. The State of New Jersey is not a foreign sovereign. It must observe the protection afforded by the Fifth Amendment and the ruling of the Court in *Murphy,* as must New York.

chamber near the conclusion of his testimony. This argument is also meritless. Assuming *arguendo* that the prosecutor had improperly rejected petitioner's request to see his attorney, *United States* v. *Mandujano, supra,* shows here also that petitioner was not thereby granted a license to commit perjury. *See, Bryson* v. *United States, supra; United States* v. *Apfelbaum, supra; United States* v. *Mandujano, supra.* To repeat what is stated above with respect to petitioner's Fifth Amendment claim, petitioner should have resorted to the court had he believed that his rights were being violated.

Further, even if petitioer's right to counsel had been violated near the conclusion of the grand jury proceeding, the facts show that he did not request to see his lawyer until he already had uttered 54 of the 55 statements which were assigned as perjurious in the three count indictment brought against him. The one perjurious statement which he made after he requested to see his attorney is contained in the second count of the indictment, and is merely cumulative of other statements assigned as perjurious in that very count. Obviously a violation of petitioner's Sixth Amendment right, had it occurred, would have an impact only upon the second count. Petitioner's convictions on counts one and three, and his concurrent sentences of imprisonment on each of those counts, would remain unaffected. In any event, the facts of this case show that the petitioner has no colorable Sixth Amendment claim.*

* It appears that petitioner requested to see his lawyer merely because he thought that the grand jury session had lasted too long. He did not object to any of the questions asked of him either before or after he made the request.

C. The Petitioner's "Perjury Trap" Claim

Petitioner's third and last argument is that the prosecutor did not call him before the grand jury to obtain information useful to its investigation of corruption in the New York nursing home industry. Rather, argues the petitioner, the prosecutor intended nothing more than to set the stage for a "perjury trap," in violation of petitioner's right to due process.

The facts of this case clearly show that petitioner, a supplier of goods to nursing homes, was called before the grand jury because he had admitted to Ira Feinberg, a nursing home operator who was cooperating with New York State's investigators, that he gave kickbacks to some of his customers. Petitioner's business consisted of supplying goods to nursing homes. Most of his nursing home customers are located in New York. The fact that the conversation took place in New Jersey did not prevent the grand jury, which was investigating the prevalence of that abuse in New York, from attempting to learn from the petitioner whether any of the recipients of his kickbacks were New York nursing homes. A grand jury may investigate events occurring outside of its jurisdiction if those events might possibly shed light upon the commission of crimes within its jurisdiction. *Blair* v. *United States,* 250 U.S. 273, 282-83 (1919). Because the grand jury was conducting a valid investigation, and because the petitioner's testimony was undoubtedly relevant to that investigation, the petitioner's perjury trap argument cannot survive. *See, Masinia* v. *United States,* 296 F.2d 871 (8th Cir. 1961).

Moreover, it is clear that petitioner was treated fairly during his appearance before the grand jury. The prosecutor warned him at the commencement of the session that he had evidence which indicated petitioner's involvement in kickback deals with nursing home customers. The prosecutor also warned petitioner on several occasions that he could be prosecuted for perjury if he lied. The prosecutor then repeatedly directed petitioner's attention to his conversation with Feinberg by framing his questions with the very same words which petitioner and Feinberg had used during their conversation.* The prosecutor's intent undoubtedly was to abide by his responsibility to jar and prod petitioner's memory, in order to bring him back to the mark with probing questions and to attempt "to flush out the whole truth." *Bronston* v. *United States,* 409 U.S. 352, 359 (1973). Lastly, at the close of the petitioner's grand jury testimony, the prosecutor made one final effort to get the truth from the petitioner by giving him an opportunity to recant or amend his testimony. Petitioner refused to do so. From the foregoing it is evident that the prosecutor was interested in obtaining the truth and that the petitioner was determined to lie.

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* The prosecutor did not play for the petitioner, in advance of his testimony, the tape recording of his conversation with Feinberg. Clearly there was no obligation for him to do so. *See, United States* v. *Del Torro,* 513 F.2d 656 (2nd Cir.), *cert. denied,* 423 U.S. 826 (1975); *United States* v. *Winter,* 348 F.2d 204 (2nd Cir.), *cert. denied,* 382 U.S. 955 (1965); *United States* v. *Camporale,* 515 F.2d 184, 189 (2nd Cir. 1975). In fact, one of the petitioner's attorneys conceded at trial that the prosecutor had no obligation to give the petitioner access to the tape recording prior to the grand jury session. Whether the petitioner recollected this conversation when he testified before the grand jury was a question of fact which the trial jury resolved against him.

Conclusion

The petition should be denied.

Respectfully submitted,

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